



Your Source for Privacy Policy from a Free-market, Pro-technology Perspective

April 12, 2004

Office of the Secretary  
Federal Communications Commission  
via ECFS

**Re: Comments of Privacilla.org on  
Department of Justice  
Components' Petition for  
Rulemaking (RM-10865)  
DA No. 04-700**

To Whom it May Concern:

Privacilla.org is pleased to make these comments on the petition by certain components of the U.S. Department of Justice for a rulemaking proceeding to resolve various issues outstanding with the Communications Assistance to Law Enforcement Act. We write to highlight some narrow points on the consequences for privacy and related interests that hinge on the Commission's decision.

Privacilla.org is a Web-based think-tank devoted to privacy as a public policy issue. On the Privacilla site, users can find hundreds of pages of information and links relating to all aspects of the privacy issue, including privacy "fundamentals;" commercial privacy including medical, financial, and online privacy; and privacy from government. Privacilla takes a free-market, pro-technology stance towards privacy, placing it at odds, sometimes, with many other privacy advocacy organizations. The Commission is likely to find unanimity among privacy advocates on this petition.

#### **Understanding Privacy**

"Privacy" has long vexed policy-makers because the term is often used casually to describe many amorphous concepts, including security, fairness, freedom from marketing, and so on. To aid in the examination of privacy issues, Privacilla has put forward a value-neutral definition of the concept. Privacy is *the subjective condition people enjoy when they have the power to control information about themselves and when they have exercised that power consistent with their interests and values.*

Parsing this definition briefly, privacy is, first, subjective: one person cannot decide for another that he or she enjoys privacy when the subject does not believe so. The first element of privacy is power over personal information. This goes to whether the legal environment allows a person to take steps that protect personal information from unwanted disclosure. The second condition, exercise of power consistent with interest and values, goes to consumer awareness and market behavior.

The Commission here considers a question that goes to the legal environment — whether consumers may take steps backed by law that protect personal information from unwanted disclosure. Extending CALEA would reduce consumers' power to protect privacy on the terms they desire.

#### **About CALEA**

The Communications Assistance to Law Enforcement Act represented a dramatic departure from the fundamental practice in our free society of designing products, technologies, and infrastructures first and foremost with consumers' interests in mind. We are aware of no other area where an entirely lawful and highly beneficial private industry has been instructed to divert its resources and bend its products and services to the needs of law enforcement.

Telecommunications and information technologies are surely very special, but they are no more special than many other technologies were at the time they were new and rapidly developing. Drawing analogies to older technologies illustrates how anomalous the CALEA regime is.

An enormous amount of criminal behavior goes on within homes, behind closed doors and drawn shades. Imagine if, at the time deadbolt locks were invented, the Department of Justice asked for copies of all keys or a mechanism to open all deadbolts. At the time mini-blinds were invented, the Department of Justice could have asked for a designed-in ability to open such blinds, subject to lawful order, because of the substantial wrongdoing that goes on behind doors and blinds.

It is obvious that designing these mundane technologies with law enforcement work-arounds would have seriously compromised the security and privacy they provide. Such deadbolts and blinds would be susceptible to clever, mechanically adept thieves and peeping toms. Designing telecommunications services or software with built-in surveillance capability does and will similarly compromise security and privacy to clever, technically adept thieves and peeping toms.

Asking for surveillance capability in doors and blinds would have been absurd, of course. Society is far better off having deadbolts and shades that shut out *all* who would enter or peer into our homes. Yet this absurdity is precisely the character of CALEA: requiring a useful, beneficial, privately produced good or service to be altered in its design for the benefit of government investigators. It inverts American values to put the interests of law enforcement ahead of the interests of our overwhelmingly honest and law-abiding civil society.

All Americans, business or individual, service provider or goods producer, should comply with lawful requests for information from law enforcement. The Fourth Amendment strikes the acceptable balance between privacy and government investigatory powers. Anyone who persistently resists, even by "slow-walking," lawful information requests should be exposed for doing so and suffer court sanctions and consumer retribution. But a strong belief in law enforcement does not extend to believing that any element of the society or its commerce should be designed to specifications written by the Justice Department.

The Commission should not ignore CALEA just because it is bad policy, of course. It is obligated to carry out CALEA's terms, advancing by interpretation of the statute the policy Congress intended.

### **The Commission Cannot Help the Justice Department Achieve its Goals**

Extending CALEA to services like Voice over Internet Protocol (VoIP) will not help the Justice Department achieve its goals. This is why the Commission should not extend CALEA to VoIP, even if it has statutory authority to do so.

By introducing the problem as one of reaching "criminals, terrorists, and spies,"<sup>1</sup> the Department implies that extending CALEA to VoIP will have a significant impact on investigating and disrupting sophisticated enemies of peace and order in the United States. In the post 9/11 environment, the threats to our society are infinitely better recognized than they were before, of course.

Ending the analysis there would lead one to conclude that CALEA capabilities in the packet-switched environment would help law enforcement agencies protect us from substantial threats to the public. But one small analytical step further reveals that the Justice Department can not get access to the communications of sophisticated enemies through CALEA.

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<sup>1</sup> Department of Justice Components' Petition, page 2.

VoIP is available from offshore producers who are under no obligation to comply with CALEA. VoIP is also being developed by the open source community, in which there is no provider to whom CALEA requirements attach. The ready availability of non-CALEA compliant VoIP assures that any sophisticated enemy of peace and order in the United States will use non-compliant VoIP for their communications. Extending CALEA requirements to U.S.-based VoIP providers will merely add costs that are disproportionate to the law enforcement benefit, because the law enforcement benefit will be only a slightly enhanced ability to catch small-time bookies, potheads, and other nincompoops.

The Commission should discount what are undoubtedly substantially overblown arguments from the Justice Department's components about the need to get access to communications. This is not because the need is not there. It is because granting all that the Commission can grant would not satisfy that need.

The Justice Department faces substantial challenges in responding to the threats that face America, threats which leapt into our consciousness on September 11, 2001. Our response must be to address those threats in ways that will successfully quell them; it must not be to ritually shed civil liberties and privacy protections. Granting the Justice Department's requests would be an example of the latter.

Sincerely,

James W. Harper  
Editor  
Privacilla.org